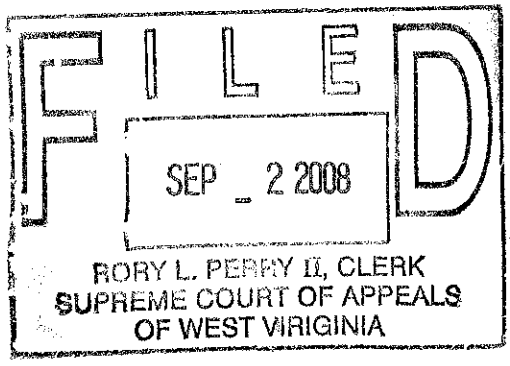
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE ex rel. DANA DECEMBER SMITH,
Appellant,

v.

Supreme Court No: 34155

THOMAS McBRIDE, Warden,
Mt. Olive Correctional Complex,
Appellee.



BRIEF OF APPELLANT

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INTRODUCTION

The Appellant, Dana Smith, is serving life without parole for a double murder that was almost certainly committed -- not by Mr. Smith -- but by Tommy Lynn Sells. Sells is a notorious serial killer currently on death row in Texas. On April 12, 2000, Sells finally confessed to the crime that the Appellant was convicted of having committed in 1991. Sells' confession has been largely corroborated by (1) Sells' presence in Kanawha County around the time of the murders in 1991, (2) the many details in the confession that only a person with intimate knowledge of the crime could have known, and (3) the *modus operandi* that is consistent with the *modus operandi* of many of the known crimes that Sells committed during his crime spree across the country during this same period of time.

As explained herein, the Appellant was charged and convicted of the crimes because he was in the wrong place with the wrong possessions. He was not in the wrong place at the wrong

time, but he was in the wrong place close enough to the wrong time that, with the benefit of an admittedly altered time of death by the medical examiner, Dr. Irwin Sopher (and in the absence of the confession from Tommy Lynn Sells) the police, prosecutor -- and ultimately the jury -- mistook the Appellant for the actual perpetrator.

Based on the newly-discovered evidence of the confession of Tommy Lynn Sells, and based on medical evidence that the Appellant was not at the crime scene at the time of death, the Appellant respectfully urges that the denial of habeas corpus relief by the Circuit Court of Kanawha County be set aside, and that a new trial be granted.

PROCEEDINGS AND RULING BELOW

The Appellant was indicted in the January 1992 term of the Circuit Court of Kanawha County in an indictment charging two counts of murder, two counts of aggravated robbery, and one count of sexual assault. Indictment No. 92-F-11. On December 30, 1992, the Appellant was convicted of the two counts of murder (felony murder in the commission of aggravated robbery). The jury did not recommend mercy. Indictment No. 92-F-11, Circuit Court of Kanawha County; Trial Tr. 2909-10. On January 28, 1993, the Appellant was sentenced to two terms of life imprisonment without the possibility of parole. Sentencing Tr. 24.

The Appellant's direct appeal to the West Virginia Supreme Court of Appeals was refused. Order, *State v. Dana December Smith*, No. 940606 (September 9, 1994).

In February 1995, the Appellant, pro se, filed a Petition for a Writ of Habeas Corpus in the Circuit Court of Kanawha County. On February 11, 1997, the Appellant, pro se, filed a second Petition for a Writ of Habeas Corpus in the Circuit Court of Kanawha County. No. 97-

Misc-43. On June 19, 2003, by retained counsel, the Appellant filed an Amended Petition for Writ of Habeas Corpus, and Memorandum in Support thereof. On July 28, 2003, the Appellant, pro se, filed an additional Amended and Supplemented Petition and Memorandum in Support thereof.

On January 20, 2004, the Circuit Court appointed the Kanawha County Public Defender Office to represent the Appellant. Evidentiary hearings in the above matter were held on January 17-18, 2006. At the conclusion of the evidentiary hearings, the Circuit Court directed counsel for the Appellant and counsel for the State to submit proposed Findings of Fact and Conclusions of Law. On September 17, 2007, the Circuit Court entered a final Order adopting the State's proposed findings and conclusions, as modified, affirming the Appellant's conviction, and dismissing his Petition for a writ of habeas corpus.

It is from the September 17, 2007, final Order of the Circuit Court of Kanawha County that the Appellant appeals.

STATEMENT OF FACTS

I. Events leading up to the Appellant's arrest and trial.

There were no eyewitnesses to the deaths of the victims, and no confessions other than the newly-discovered confession of Tommy Lynn Sells. As explained herein, the Appellant was charged with the offenses on the basis of circumstantial evidence, primarily consisting of his presence in the area near the time of the victims' deaths (though not at the actual time of their deaths) and because of testimony that he was seen driving the victims' car.

According to the testimony presented at the Appellant's trial, on Saturday, September

7, 1991, shortly before 5:00 pm, the Appellant was driving the car of a family friend on Cabin Creek Road, near the town of Ohley. The Appellant lost control of the car on a curve in the road. The car ran off the road and rolled over. The Appellant received minor cuts in the accident. Trial Tr. 2228-33, 2243-47.

After the automobile accident, the Appellant hitchhiked from the scene of the accident at Ohley to the forks of Cabin Creek Road, near the town of Leewood. Trial Tr. 2236-39.

Two days later, on Monday, September 9, 1991, shortly after 5:00 pm, the bodies of Margaret McClain and her daughter, Pamela Castaneda, were found in their home at Leewood. Trial Tr. 1738-40. The victims' vehicle was missing. Trial Tr. 1813.

The following day, Tuesday, September 10, the Appellant was questioned by Kanawha County deputies about the murders. He denied committing the crimes, and was neither charged nor arrested. Trial Tr. 1428-30, 1471.

On the same day, Tuesday, September 10, the State Police found the victim's car in a secluded area near Chapmanville, West Virginia. Trial Tr. 1816-17.

On Wednesday, September 11, 1991, on the basis of the Appellant's car accident at Ohley, the Appellant was arrested for failure to maintain control and leaving the scene of an accident. Trial Tr. 1951-55. While in custody on traffic charges, blood and hair samples were collected from the Appellant for testing in the murder investigation. Trial Tr. 1956-60. The Appellant was released the following day, Thursday, September 12, when his bond on the traffic charges was reduced. Trial Tr. 1964.

On Monday, September 16, 1991, the Appellant was again arrested. This time he was charged with both murders. Criminal Complaint No. 91-F-1189, Magistrate Court of Kanawha County. The Appellant has been in custody since the date of this arrest.

The Appellant was indicted in the January 1992 term of court. The five-count indictment includes:

Count One: murder of Pamela Castaneda.
Count Two: aggravated robbery of the automobile, video cassette recorder, and stereo of Pamela Castaneda.
Count Three: First degree sexual assault of Pamela Castaneda.
Count Four: murder of Margaret McClain.
Count Five: aggravated robbery of unspecified property from Margaret McClain.

Indictment No. 92-F-11, Circuit Court of Kanawha County.

II. Evidence presented at the Appellant's trial.

The Appellant's trial was conducted on November 23 through December 30, 1992. With no eyewitnesses to the murders, and with the confession of Tommy Lynn Sells not yet having occurred, the evidence against the Appellant was circumstantial. The key circumstantial testimony against the Appellant consisted of the following:

Steve Pritt, a friend of the Appellant, testified that on Saturday, September 7, 1991, in the late afternoon, the Appellant visited him at his father's home in Leewood, on Cabin Creek Road, about a quarter of a mile above the victims' house. Trial Tr. 2343-44.

The Appellant left the Pritt house at about 5:00 pm, driving northbound (that is, downstream) on Cabin Creek road. Trial Tr. 2357. Mr. Pritt left the house himself at about 6:00 pm. 2359-60. In critical testimony bearing on the time of the victims' deaths, Mr. Pritt testified that when he passed the victims' home at 6:00 pm, or a little after 6:00 pm, he observed both victims standing outside their house, speaking to a neighbor. Trial Tr. 2360.

Kenneth Russell, the fire chief at Cabin Creek, testified that sometime around 5:00 pm on September 7, 1991, he observed the Appellant wreck the car that he was driving, northbound, on Cabin Creek Road, near Ohley. Trial Tr. 2228-34. (Ohley is approximately four miles north of the victims' home in Leewood. Trial Tr. 1849)

Harold Brown, a passerby, testified that he was driving southbound (upstream) on Cabin Creek Road and stopped at the scene of the Appellant's car accident. He testified that the Appellant hitchhiked a ride with him, southbound, to the forks of Cabin Creek Road, just below Leewood.

Detective John W. Johnson testified that, according to telephone records, the Appellant made a telephone call from a pay phone in Fosterville, Boone County, at 6:11 pm, more than a half-hour drive from the victims' home. Trial Tr. 1962; Kanawha County Sheriff Department Report of Investigation, p. 33.

The timing of this 6:11 pm telephone call by the Appellant, from more than a half-hour away, is significant. As set forth above, Steve Pritt testified that when he passed the victims' home at 6:00 pm "or a little after," he observed both victims alive, standing outside their house, speaking to a neighbor. Trial Tr. 2360. By the time that Mr. Pritt saw the victims at 6:00 pm or a little after, the Appellant had already departed the vicinity of the victims' house, as documented by telephone records indicating that the Appellant was in Fosterville, Boone County, at 6:11 pm, more than a half-hour drive from the victims' home. Trial Tr. 1962; Kanawha County Sheriff Department Report of Investigation, p. 33.

Anita McKinney, a friend of the Appellant, testified that the Appellant arrived at her house in Foster, in Boone County, somewhere between 6:45 and 7:00 o'clock on Saturday,

September 7, 1991. Trial Tr. 2252-54. She did not recall the type of car the Appellant was driving, except that it was light-colored and muddy. Trial Tr. 2255.

Ms. McKinney further testified that the Appellant left her house shortly after 7:00 pm and returned about an hour later. Trial Tr. 2255. He spent the night on the floor of her living room and left the next day, Sunday, September 8, 1991, at about 10:00 am. Trial Tr. 2260-61. He returned to her house the same evening, at about 6:00 pm, and stayed until about 1:00 am. Trial Tr. 2261-62.

Jeanette Laws, another friend of the Appellant, testified that between 7:30 and 8:00 pm, on Saturday, September 7, 1991, the Appellant came to her house in Boone County, driving a white Ford Taurus station wagon, and wearing a camouflage jacket and a "white teddy bear T-shirt." Trial Tr. 2331-33. He was bleeding from cuts and scratches. Trial Tr. 2334. She further testified that the Appellant took off the teddy bear T-shirt and left it at her house. Trial Tr. 2234. (As explained below, the DNA evidence that was introduced at trial was the results of tests that were performed on bloodstains on this T-shirt.)

Denise Morgan, another friend of the Appellant, testified that at about 11:30 am on Sunday, September 8, 1991, the Appellant came to her house in Madison, driving a white Taurus station wagon. She testified that the Appellant left a VCR, a CB radio, and a Walkman radio headset at her house. Trial Tr. 2451-55.

Robert McClain, the son and brother of the victims, testified that he arrived at the victims' home at Leewood, on Cabin Creek Road, shortly after 5:00 pm on Monday, September 9, 1991 (two days after the Appellant's presence on Cabin Creek). Upon entering the home, he discovered the bodies of his mother, Margaret McClain, age 63, and his sister, Pamela Castaneda, age 36. Trial Tr. 1740.

Mr. McClain further testified that he and the Appellant were friends, and that the Appellant had visited the McClain home in Leewood several months earlier, in July 1991. Trial Tr. 1742, 1756. He further testified that he recognized the teddy bear T-shirt, introduced into trial as State's Exhibit No. 40, as a type of T-shirt that his sister made for family members and for sale. Trial Tr. 1737, 1754-56.

Detective John W. Johnson, the detective in charge of the crime scene investigation, testified that upon arriving at the crime scene, he found the victims in their house, lying in pools of blood, both nude from the waist down. Trial Tr. 1761. He collected various bloodstained items from the house for testing, along with the teddy bear T-shirt retrieved from the home of Jeanette Laws. Trial Tr. 1861.

Det. Johnson also testified that on Tuesday, September 10, the State Police found the victims' white Ford Taurus station wagon in a secluded area near Chapmanville, West Virginia. Trial Tr. 1813, 1816-17.

Dr. Irvin Sopher, Chief Medical Examiner for the State of West Virginia, testified that the victims' bodies arrived at the Medical Examiner's Office at 7:50 pm on Monday, September 9, 1991, and were refrigerated overnight. Trial Tr. 2574.

Dr. Sopher prepared autopsy reports stating that the autopsy of Pamela Castaneda began at 9:15 am on Tuesday, September 10. The autopsy report described a total of 15 stab wounds to the front and back of her body. Dr. Sopher testified to observing numerous spermatozoa on a vaginal slide from Ms. Castaneda, the majority with tails intact. Trial Tr. 2542-43. (By contrast, Linda Harrison, the DNA analyst from the FBI crime lab, testified that "There wasn't any seminal fluid" on the vaginal swab. Consequently, despite Dr. Sopher's assertions that he

identified numerous spermatozoa, no DNA results were obtained to support a finding of sexual assault or to identify the DNA profile of the sexual fluids. Tr. 2195-96.)

The autopsy of Margaret McClain began later the same day, at 12:15 pm. The autopsy report described a total of 14 stab wounds to Ms. McClain's body.

Based on the degree of rigor mortis in the two bodies, Dr. Sopher initially gave the police an estimated time of death of late Sunday evening, September 8, 1991, or early Monday morning, September 9, more than a day after the Appellant was on Cabin Creek. (Trial Tr. 1973-74, 2572, and notes of detective provided during pretrial discovery, stating "Dr. Sopher believes due to conditions of location and body changes, that death occurred late Sunday night or early Monday morning.") This estimated time of death, late Sunday night or early Monday morning, is long after the time of 5:00 pm, Saturday, when the Petitioner was in the vicinity of the victims' homes.

Prior to trial, Dr. Sopher changed his estimate of the time of death from late Sunday evening or early Monday morning to 5:00 pm, Saturday, September 7, 1991. (Postmortem Examination Record, Margaret McClain, p.1; Postmortem Examination Record, Pam Castaneda, p. 1; Trial Tr. 2565-66.) The change of the time of death by Dr. Sopher was based on (1) the statements of witnesses that the Appellant was seen driving the victims' car, (2) the belief of the investigating officers that the Appellant must have also been the person who killed the victims, and (3) the information that Dr. Sopher was given regarding the last time the victims were seen alive. Trial Tr. 2563, 2565-66, 2598-2600.

The change in the time of death was not based on any scientific evidence, but was a change made solely for the purpose of matching the time of death with the time that the Appellant was believed to be in the vicinity of the crime scene. *See* Trial Tr. 2563, 2565-66,

2598-2600. (At trial, Dr. Sopher testified falsely that he only changed the time of death between 12 to 18 hours. Tr. 2598, 2600. In reality, as explained above, the change in the time of death was about 30 to 38 hours -- about a day and a half.)

There was no DNA evidence from the crime scene that was introduced at trial. The DNA testimony that was introduced at trial was by Linda Harrison, an analyst in the DNA unit of the FBI Crime Laboratory. Analyst Harrison testified that she tested the bloodstains on the teddy bear T-shirt that the Appellant had taken to the home of Jeanette Laws when he arrived driving the victims' car. Analyst Harrison testified that one of the bloodstains on the T-shirt matched the blood type of the Appellant with a one in twenty-five (1 in 25) random match probability (that is, one in twenty-five persons within the general population have the same DNA profile.) Trial Tr. 2184. Because of the unusually low random match probability, the trial judge gave a cautionary instruction to the jury not to conclude guilt or innocence on this basis alone. Trial Tr. 2184.

Analyst Harrison also testified that another small bloodstain on the teddy bear T-shirt, a stain that was totally consumed by DNA testing, matched the blood type of Pamela Castaneda along with one in fifty-five thousand two hundred (1 in 55,200) random match probability. Trial Tr. 2181, 2186.

The DNA testimony about the profiles of the bloodstains on the teddy-bear T-shirt that came from the victims' car was not particularly significant at trial, because it was undisputed that the Appellant drove the victims' car at a time when he was injured and bleeding from his own car wreck, Trial Tr. 2229, 2243, (thereby accounting for his own blood on the T-shirt), and the victim, Pamela Casteneda, suffered from chronic colon disease, had a colonoscopy, and experienced continual bleeding (thereby accounting for a small spot of her own blood on the T-shirt.) Trial Tr. 1709-10.

There was no other DNA evidence introduced at trial. The only other DNA results that had been obtained in the case were obtained from a gauze pad within the victims' house. These results were suppressed by the Court in pretrial suppression proceedings because the random match probability was determined to be one in seven, a random match probability that was deemed to be too low to be admissible. Trial Tr. 1375, 2144.

Sgt. Mark Neal, a fingerprint examiner for the West Virginia State Police Crime Lab, testified that the only fingerprints that could be identified on crime scene evidence was that of the victims. Trial Tr. 2204-05

Tpr. Ted Smith, a serologist at the West Virginia State Police Crime Lab, testified that he examined hairs found in the hand of Pamela Castaneda and determined that the hairs were similar to the hair of Ms. Castaneda, and not the Petitioner. Trial Tr. 2119.

There was no other significant scientific evidence introduced at trial.

III. Conviction and sentence.

On December 30, 1992, the Appellant was convicted of two counts of felony murder in the commission of aggravated robbery, without a recommendation of mercy. (The verdict form for the count involving the victim, Pamela Casteneda, had three options for a guilty verdict, variations relating to whether the jury found the Appellant guilty of felony murder based on the commission of aggravated robbery, guilty of felony murder based on the commission of sexual assault, or guilty of felony murder based on the commission of both aggravated robbery and sexual assault. The jury chose felony murder based on the commission of aggravated robbery. Consequently, the Appellant was convicted of counts involving murder and robbery, but was not convicted of any counts involving sexual assault.) Jury Verdict Form, filed December 30, 1992;

Trial Tr. 2909-10, Indictment No. 92-F-11, Circuit Court of Kanawha County.

On January 28, 1993, the Appellant was sentenced to two terms of life imprisonment, without the possibility of parole. Sentencing Tr. 24; Order, January 28, 1993; Commitment, January 28, 1993. (The Court did not specify whether the sentences would run consecutively or concurrently. Pursuant to *Keith v. Leverette*, 163 W.Va. 98, 254 S.E.2d 700 (1979), in the absence of specification, sentences run consecutively)

IV. Appeal.

The Appellant's direct appeal to the West Virginia Supreme Court of Appeals raised issues regarding search and seizure and the reliability of the DNA testimony that was presented at trial. *State v. Dana December Smith*, No. 940606, filed March 17, 1994. The Petition was refused by Order of September 9, 1994.

V. Post-conviction habeas corpus proceedings.

In February 1995, the Appellant, pro se, filed a Petition for a Writ of Habeas Corpus in the Circuit Court of Kanawha County. On February 11, 1997, the Appellant, pro se, filed a second Petition for a Writ of Habeas Corpus in the Circuit Court of Kanawha County. No. 97-Misc-43. On June 19, 2003, by retained counsel, the Appellant filed an Amended Petition for Writ of Habeas Corpus, and Memorandum in Support thereof. On July 28, 2003, the Appellant, pro se, filed an additional Amended and Supplemented Petition and Memorandum in Support thereof.

On January 20, 2004, the Circuit Court appointed the Kanawha County Public Defender Office to represent the Appellant.

A. The Appellant's habeas testimony.

Evidentiary hearings in the above matter were held on January 17-18, 2006. At the evidentiary hearing, the primary evidence presented by the Appellant included the following:

Jane Brumfield, a paralegal in the Kanawha County Public Defender Office, testified that upon the appointment of the Kanawha County Public Defender Office in 2004, she learned that another person, Tommy Lynn Sells, had confessed to the crimes that the Appellant had been convicted of committing. Habeas Tr. 15, 20.

In an effort to corroborate Sells' confession, Ms. Brumfield was able to confirm Sells' presence in Kanawha County during a portion of the early 1990s by locating arrest records for Sells, in Kanawha County, for malicious wounding, in May 1992. Habeas Tr. 16-17, 28-29. Upon his arrest in Kanawha County, Sells remained in custody in West Virginia until his release in 1997. Habeas Tr. 17.

In reconstructing Sells' history, Ms. Brumfield was able to determine that, upon his release from prison in 1997, Sells then drifted across the country until his arrest in Texas, on charges of capital murder, on January 2, 2000. Habeas Tr. 17-18.

While awaiting trial in Texas on capital murder charges, Sells began confessing to Texas Rangers to a series of other murders that he committed across the country. On April 12, 2000, as part of his series of confessions, Sells confessed to the Texas Rangers that he committed the murders in Cabin Creek, the murders for which the Appellant was convicted. Habeas Tr. 20.

Sgt. John Allen, a Sergeant in the Texas Rangers, testified by deposition that he arrested Tommy Lynn Sells on January 2, 2000. Dep. Tr. 7. Sgt. Allen interrogated Sells during the long

series of confessions to unrelated serial murders. Dep. Tr. 8-10. Sgt. Allen was able to confirm that Sells in fact committed 15 of the murders to which he confessed. Dep. Tr. 16.

On April 12, 2000, Sells confessed to Sgt. Allen that he committed the September 1991 murders on Cabin Creek. Dep. Tr. 11, 18. Sgt. Allen stated that, unlike other confessions, the confession to the Cabin Creek murders was more free-flowing. Dep. Tr. 21-22.

Sgt. Allen wrote a report of the April 12, 2000, confession, in which Sells set forth the following facts:

- Sells committed a double homicide
- in Kanawha County, West Virginia
- in September 1991
- the victims were a mother and daughter
- the victims resided on Cabin Creek near the Boone County line
- the daughter's name was Pamela
- Sells met Pamela at the Route 60 Lounge
- the elderly mother was in poor health
- the victims owned a white Ford Taurus automobile
- Sells stayed in the victims' upstairs attic for two or three days prior to murders
- Sells traded the victims' television set for narcotics
- during an argument over the sale of the television, Sells repeatedly stabbed the victims
- the stabbing was committed in the downstairs area of the residence
- Sells removed the victims' pants to make the attack look sexually motivated
- Sells left the victims' automobile behind and hitchhiked out of area

Deposition, Sgt. Allen, Habeas Exhibit No. 1, pp. 2-3.

Sgt. Coy Dale Smith, also a Sergeant in the Texas Rangers, testified by deposition to facts similar to those testified to by Sgt. Allen. Smith Dep. 3-23.

At the habeas hearing, Janet Smith Elswick, the former operator of a boat dock and restaurant in Chesapeake, West Virginia, also testified that she saw the victims alive on Sunday, September 8, 1991, or Monday, September 9, 1991, either one or two days after the date that the

Appellant wrecked his car on Cabin Creek and hitchhiked near the area of the victims' home. Habeas Tr. 44-46, 51. When Ms. Elswick saw the victims, they were with a man who appeared to Ms. Elswick to be Columbian. Habeas Tr. 45-46. Ms. Elswick later learned that the victim, Pamela Castaneda, was married to a person from Columbia. Habeas Tr. 47.

Jeanette Laws Kirk, a former friend of the Appellant, testified that Janet Smith Elswick told her that she saw one of the victims alive after the date that the victim "was supposed to have been dead." Habeas Tr. 57. Ms. Kirk testified that, prior to her testimony in the Appellant's trial, she notified the prosecution that Ms. Elswick saw one of the victims alive, after the victim's presumed date of death. Habeas Tr. 56-57.

Fredric William Whitehurst, a former chemist in the FBI crime lab and current forensic consultant, testified that, in light of his personal observations, and in light of his studies of quality assurance and studies of subsequent reports of the Office of the Inspector General, that there was not sufficient quality assurance in place at the time of the DNA testing of the evidence in the Appellant's case to assure the reliability of the results. Such lack of reliability includes a "very strong possibility of cross-contamination" of evidence. Habeas Tr. 84-86.

A videotape of the CBS News television program, 48 Hours, which aired on February 1, 2001, was also introduced into evidence at the Appellant's habeas hearing. The program includes an interview of Tommy Lynn Sells, on death row in Texas. In the televised interview, Sells refers to murders that he committed in West Virginia. Sells states, "This is two females and it happened in '91 . . ." Although the transcript prepared by Burrelle's Information Services (Respondent's Habeas Exhibit No. 2) contains no further details, upon viewing the video that was submitted into evidence and played before the Court, after stating "This is two females and it happened in '91," Sells also appears to include the words "on Cabin Creek."

The Appellant learned of Tommy Lynn Sells' confession upon watching the broadcast of the 48 Hours program in his prison cell on February 1, 2001. The Appellant notified his counsel that Sells appeared to have confessed to the murders for which the Appellant was convicted. In 2004, the Appellant's new counsel, Wendy Campbell, confirmed the detailed confession by Sells and moved to take Sells' deposition, along with the depositions of the Texas Rangers who obtained Sells' initial confession to the murders. Motion for Leave of Court to Conduct Depositions, and Memorandum of Law in Support of Motion for Leave of Court to Conduct Depositions, June 9, 2004.

The Motion for Leave of Court to Conduct Depositions was granted by Order of July 19, 2004.

Tommy Lynn Sells, on death row in Texas, testified by deposition conducted on September 29, 2004. Sells stated that he arrived in West Virginia in August of 1991. He testified that he met the victim Pamela Castaneda in a bar in St. Albans, near Route 60. Dep. Tr. 14-15. He stated that he went home with Ms. Castaneda, and spent two or three days living in the attic of her house. Dep. Tr. 18. On the last day of his stay in the house, he argued with both of the victims and stabbed them repeatedly with a kitchen knife. Dep. Tr. 19-21. He removed Ms. Castaneda's pants to make the murders look like a sex crime. Dep. Tr. 23. He then cleaned up in the kitchen, and left the house on foot. Dep. Tr. 25-26. He also took a CB radio from the house. Dep. Tr. 44, 56.

Sells further testified that after he was arrested for unrelated crimes, he was housed in the Kanawha County jail with the Appellant, but that he does not know the Appellant personally. Dep. Tr. 28-29. He stated that he has not communicated with the Appellant, received any messages from him, or read articles about the murders of the victims. Dep. Tr. 31.

At the habeas hearing, Daniel J. Spitz, a forensic pathologist, testified that based on the medical changes in the victims' bodies, Dr. Sopher's estimate of the time of death that he testified to at trial was "wrong," and that Dr. Sopher's original estimate of the time of death ("late Sunday night or early Monday morning") was correct. Habeas Tr. 119, 125.

Dr. Spitz explained that, although the estimate of the time of death is not an exact science, upon death rigor mortis ordinarily develops to maximum rigidity over a 12-hour period. Rigor mortis remains at an intense level for 12 more hours (from 12 to 24 hours after death). Then rigor mortis dissipates for the next 12 hours (from 24 to 36 hours after death), at which time no degree of rigor mortis remains. Habeas Tr. 111-12. See also, Spitz & Fisher, *Medicolegal Investigation of Death* (4th ed. 2006) at 101.

Dr. Spitz further testified that spermatozoa degenerates, and loses its tails, in the range of 16 to 20 hours after deposition. Habeas Tr. 115.

Dr. Spitz stated that the autopsy records indicate that the bodies of the victims were delivered to the Medical Examiner's Office and refrigerated at 7:50 pm on Monday, September 9, 1991. Habeas Tr. 117. Dr. Spitz explained that, upon refrigeration, the progression in rigor mortis doesn't stop, but is significantly retarded. Habeas Tr. 117.

The autopsy of Pamela Castaneda was performed at 9:15 Tuesday morning, September 10, 1991. Postmortem Examination Record, Pamela Castaneda, September 10, 1991. Dr. Spitz testified that based on the degree of rigor mortis found in the body of Pamela Castaneda at the time of autopsy ("marked rigor mortis of the jaw and lower extremities, and mild rigor of the neck and upper extremities"), and based on the finding that the vast majority of spermatozoa still had tails, the range of the estimated time of death would be 12 to 36 hours before refrigeration

(that is, sometime between 7:50 am Sunday morning and 7:50 am Monday morning). Habeas Tr. 118.

By contrast, as set forth above, the time that the Appellant was in the area of Cabin Creek was approximately 5:00 pm Saturday, September 7 (that is, not 12 to 36 hours before refrigeration of the bodies, but about 51 hours before refrigeration, and about 64 hours before the autopsy.) Habeas Tr. 118.

Similarly, the autopsy of Ms. McClain was performed at 12:15 pm Tuesday, September 10, three hours after the autopsy of Ms. Castaneda. Postmortem Examination Record, Margaret L. McClain, September 10, 1991. Mild rigor mortis was found in Ms. McClain in her lower extremities and absent in other areas of her body. Habeas Tr. 120. (The passage of time from the time the Appellant was observed in Cabin Creek until refrigeration of Ms. McClain's body was approximately 51 hours, the same as for Ms. Castaneda. The time before Ms. McClain's autopsy was approximately 67 hours.)

Consequently, the medical evidence of the time of death indicates that both victims were, in fact, killed sometime on Sunday or early Monday morning, long after the Appellant had left the area.

B. The State's habeas testimony.

At the conclusion of the testimony of the witnesses presented by the Appellant, the State called witnesses who testified as follows:

Brian Keith Pringle, formerly a corrections officer at the Kanawha County Jail, testified that he remembers working at the Kanawha County Jail in May 1992, and remembers that both

the Appellant and Tommy Lynn Sells were placed in individual cells in "First Left," the lockdown section of the jail, separate from the general population. Habeas Tr. 131.

Officer Pringle stated that, although in lockdown, prisoners on First Left would have at least an hour a day of access to speak to each other. Habeas Tr. 132. He has no memory of the Appellant and Sells communicating with each other. Habeas Tr. 133. He has no jail records confirming that the Appellant and Sells were, in fact, housed in the same lockdown section of the jail. Habeas Tr. 134.

Diane Fanning, the author of a biography of Tommy Lynn Sells, testified that she interviewed Sells on numerous occasions while he was in jail in Texas, primarily in 2001 and 2002. Habeas Tr. 138-40, 165.

On direct examination, Ms. Fanning stated that every time that she asked Sells about the Cabin Creek murders, that Sells said that he did not commit the crimes. Habeas Tr. 142. On cross-examination, however, Ms. Fanning reviewed a series of e-mails that she had sent to Appellant's counsel Wendy Campbell, in which she states the opposite. Included in the e-mails from Ms. Fanning to Ms. Campbell is an e-mail dated April 7, 2004, that states, "Sells told me that he is guilty of this [Cabin Creek] murder this Monday." Appellant's Habeas Exhibit No. 6; Habeas Tr. 165.

Ms. Fanning further acknowledged that in the series of murders where Sells has confessed, and the confessions have been confirmed, that the most common murder weapon was a knife, and that Sells' crimes involved multiple stab wounds, rapes, leaving victims in postured sexually suggestive positions, in homes in rural areas, where Sells carefully cleaned up and left no fingerprints or other traces of himself. Habeas Tr. 151-54.

Thomas Lee, the son-in-law and brother-in-law of the victims, testified that his wife was the executor of the estate of both victims. Habeas Tr. 195. Mr. Lee stated that, in helping his wife to inventory the possessions in the victims' home in September 1991, that he reviewed the contents of the attic. He stated that the attic was used for storage, that it contained a mattress but no bathroom, and that, in his opinion, it had not been used as a bedroom. Habeas Tr. 197-99.

C. The Appellant's habeas testimony in rebuttal.

In rebuttal, the Appellant called Wendy Campbell, former counsel for the Appellant. Ms. Campbell testified that she communicated by telephone and by e-mail with Diane Fanning about Tommy Lynn Sells' confession to the Cabin Creek murders. Habeas Tr. 233. Ms. Campbell authenticated her e-mails from Ms. Fanning, e-mails from Ms. Fanning contradicting her habeas testimony and informing Ms. Campbell that Sells confessed to the Cabin Creek murders. Habeas Tr. 233. Ms. Campbell also testified that at no time did Ms. Fanning inform her that Sells recanted or denied his confession. Habeas Tr. 235.

D. Motion to re-open the deposition of Tommy Lynn Sells.

On February 17, 2006, the State provided to the Circuit Court a signed statement purportedly taken from Tommy Lynn Sells, by the Val Verde Sheriff Department, on February 7, 2006. Tr. Feb. 17, 2006, hearing, p. 9. In the statement, Sells asserted that he fabricated his confession to the Cabin Creek murders. Sells stated that he based the confession on facts about the Cabin Creek murders that were provided to him at the Val Verde County Jail in a letter written to him from someone in Indiana, and also in a letter written to his Texas lawyer by the Appellant's former West Virginia habeas lawyer, Wendy Campbell.

Based on the February 7, 2006, recantation by Sells, the State orally moved to re-open the deposition of Tommy Lynn Sells, or in the event that Sells declines to be re-deposed, the deposition of Deputy Larry Pope, the officer who obtained the purported recantation. Tr. Feb. 17, 2006, hearing at 5, 9, 11-14. At the time, the Circuit Court took the motion under advisement. The Court also requested the parties to submit additional documents regarding the recantation of Sells and the policies and documentation regarding Sells' access to information about the Cabin Creek murders while in the Texas jail. Tr. Feb. 17, 2006 hearing, p. 16-17.

On February 16, 2006, the State submitted to the Circuit Court photocopies of the envelopes of correspondence that Sells' received in the Val Verde County Jail. Contrary to the statements in Sell's alleged recantation, none of the correspondence that Sells received was from West Virginia or Indiana.

Additionally, on March 15, 2006, counsel for the Appellant submitted to the Circuit Court a March 14, 2006, letter from the Sheriff of Val Verde County, enclosing a copy of the Correspondence Plan of the Val Verde County Jail. The March 14, 2006, letter from the Sheriff also stated that a review of all envelopes of Sells' incoming and outgoing mail found no correspondence between Sells and anyone in the State of West Virginia or the State of Indiana.

Furthermore, Tommy Lynn Sells' confession occurred in the Val Verde County Jail in Del Rio, Texas, on April 12, 2000. Assistant Public Defender Wendy Campbell's first involvement in this case did not occur until nearly four years later (Order of January 20, 2004, appointing the Kanawha County Public Defender Office to represent the Appellant), rendering it impossible for the confession to be based on information provided by Ms. Campbell.

By Order of April 10, 2006, the Circuit Court granted the State's motion to further depose Sells. The State did not complete the arrangements for either the deposition of Sells or of the officer who obtained the purported recantations, and the depositions did not occur.

E. Trial court's ruling.

At the conclusion of the habeas proceedings in the Circuit Court of Kanawha County, the Court directed the Appellant and the State to file proposed Findings of Fact and Conclusions of Law. On September 17, 2007, the Court filed a final Order, essentially adopting the proposed findings and conclusions proposed by the State.

In its Findings of Fact and Conclusions of Law, the Trial Court held that Sells' confession was a fabrication, that Sells recanted the confession, and that there was no evidence presented at the habeas hearing that would produce an opposite result at trial.

ASSIGNMENTS OF ERROR

I. The Circuit Court Erroneously Denied Habeas Corpus Relief to the Appellant Because the Newly-Discovered Confession of Tommy Lynn Sells Meets All Five Criteria for Granting a New Trial Based on Newly-Discovered Evidence.

II. The Circuit Court Erroneously Considered a Purported Recantation by Tommy Lynn Sells, Despite the Recantation Being Unauthenticated, Unsworn, and Not Subject to Cross-Examination, in Violation of the Rules of Evidence and This Courts' Precedents Regarding Recantations.

DISCUSSION OF LAW

I. The Circuit Court Erroneously Denied Habeas Corpus Relief to the Appellant Because the Newly-Discovered Confession of Tommy Lynn Sells Meets All Five Criteria for Granting a New Trial Based on Newly-Discovered Evidence.

The Appellant should receive a new trial because the newly-discovered confession of Tommy Lynn Sells, and the circumstances surrounding the confession, meet all of the long-established requirements for granting of a new trial based on newly-discovered evidence.

A. Standard of review on appeal.

This Court's standard of review for a circuit court's ruling denying habeas relief is as follows:

> In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syllabus Point 1, *Mathena v. Haines,* 219 W.Va. 417, 633 S.E.2d 771 (2006).

B. Standard for granting a new trial based on newly-discovered evidence.

The standard for granting a new trial based on newly-discovered evidence, as applicable in circuit courts, is set forth in five parts:

> A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been

> discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that [the defendant] was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division, 633 S.E.2d 762, 769 (2006); *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979).

As set forth herein, the Circuit Court's final order in denying a new trial is an abuse of the Court's discretion because it is based on underlying factual findings that are clearly erroneous. In the following review of the five-part standard for granting a new trial based on newly-discovered evidence, the Appellant meets all five requirements.

1. First requirement for granting a new trial (date of discovery).

The first requirement for a new trial based on newly-discovered evidence is that the newly-discovered evidence must have been discovered since the date of the trial. The trial of the Appellant was conducted from November 23 through December 30, 1992. The first confession of Tommy Lynn Sells occurred over seven years later, to the Texas Rangers, on April 12, 2000.

Sells ultimately confessed a total of five times, all after the trial: first, to the Texas Rangers on April 12, 2000 (Habeas Tr. 20); second, during the filming of the 48 Hours television program, first aired on February 1, 2001 ((Respondent's Habeas Exhibit No. 2); third, to biographer Diane Fanning, on April 7, 2004 (Appellant's Habeas Exhibit No. 6, Habeas Tr. 165); fourth, to Wendy Campbell and Jane Brumfield, on May 11, 2004 (Attachment D of Motion for Leave of Court to Conduct Depositions, filed June 9, 2004); and fifth, in his deposition, under

oath and subject to cross-examination, on September 29, 2004 (Habeas Tr. 98). All five of these confessions occurred after the date of the Appellant's trial.

2. Second requirement for granting a new trial (due diligence).

The second requirement for granting a new trial based on newly-discovered evidence is that the evidence must be such that due diligence would not have secured it before the verdict. As was confirmed by the habeas testimony of Sells' biographer, and by the biography itself, Sells was a homeless drifter, committing serial murders across the country but evading capture because of his careful pattern of cleaning up the crime scenes to remove all traces of himself. Habeas Tr. 153; Respondent's Habeas Exhibit No. 3. Because Sells' identity as a serial killer was not known by the police until the year 2000, it was not possible for the defense, with due diligence, to have identified Tommy Lynn Sells and to have elicited his confession before the date of trial in 1992.

3. Third requirement for granting a new trial (non-cumulative evidence).

The third requirement for granting a new trial based on newly-discovered evidence is that the evidence must be new and material, and not merely cumulative. The newly-discovered evidence in the Appellant's case is not cumulative because there are no other confessions to the Cabin Creek murders, by Sells or by anyone else.

4. Fourth requirement for granting a new trial (ought to produce an opposite result in a new trial).

The fourth requirement for a new trial based on newly-discovered evidence is that the newly-discovered evidence much be such that it ought to produce an opposite result in a second trial on the merits. The newly-discovered evidence in the Appellant's case ought to produce an opposite result because, for the following reasons, the confession of Tommy Lynn Sells is substantially corroborated, while the recantation is both inadmissible and inherently contradictory.

(a) Corroboration of the confession.

Tommy Lynn Sells was arrested and placed in the Val Verde County Jail in Texas on January 2, 2000. Deposition Tr., Sgt. Allen, p. 7. Three months later, on April 12, 2000, while still at the Val Verde Jail awaiting trial in Texas, Sells confessed to the Cabin Creek murders. As set forth above in the Statement of Facts, Sells' confession contains extensive details:

- Sells committed a double homicide
- in Kanawha County, West Virginia
- in September 1991
- the victims were a mother and daughter
- the victims resided on Cabin Creek near the Boone County line
- the daughter's name was Pamela
- Sells met Pamela at the Route 60 Lounge
- the elderly mother was in poor health
- the victims owned a white Ford Taurus automobile
- Sells stayed in the victims' upstairs attic for two or three days prior to murders
- Sells traded the victims' television set for narcotics
- during an argument over the sale of the television, Sells repeatedly stabbed the victims
- the stabbing was committed in the downstairs area of the residence
- Sells removed the victims' pants to make the attack look sexually motivated
- Sells left the victims automobile behind and hitchhiked out of area

Deposition, Sgt. Allen, Habeas Exhibit No. 1, pp. 2-3.

In Sells' deposition of September 29, 2004, Sells repeated the basic facts of his April 12, 2000, confession, under oath, and subject to cross-examination. Appellant's Habeas Exhibit No. 3. Upon cross-examination by the State, Sells did not retreat from any of his assertions during direct examination.

The essential facts asserted by Sells in his April 12, 2000, confession, and in his September 29, 2004, deposition, are consistent with the documented facts of this case, as set forth above in the Statement of Facts and as set forth in the evidence presented at trial. Furthermore, there are details that Sells provided in his April 12, 2000, confession -- such as the name of the bar in St. Albans, the Route 60 Lounge, where one of the victims socialized in 1991 -- details that are so obscure that the corroboration is truly compelling. Trial Tr. 2656-57 (testimony by the owner of the Route 60 Lounge).

The documented facts of this case are also consistent with Sells' known *modus operandi* in numerous serial killings across the country, including the multiple stab wounds, rape of victims, leaving victims in postured, sexually suggestive positions, murders committed in homes in rural areas, and careful cleaning in order to leave no fingerprints or other traces of himself at the crime scene. Habeas Tr. 151-54; Respondent's Habeas Exhibit No. 3 (biography of Tommy Lynn Sells).

The confession of Tommy Lynn Sells is further supported by the testimony of Janet Smith Elswick that she saw the victims, alive, one or two days after the time that the Appellant was in the vicinity of the victims' home. Habeas Tr. 44-47.

Ms. Elswick, in her habeas testimony, is the second person who testified she saw the victims alive after the time the Appellant was in the vicinity of the victims' home. At trial, Steve Pritt testified he saw both victims standing outside their house, speaking to a neighbor at 6:00 pm "or a little after" on Saturday, September 7, 1991. Trial Tr. 2360. By the time that Mr. Pritt saw the victims at 6:00 pm, the Appellant had departed the vicinity of the victims' house, as documented by telephone records indicating that the Appellant made a telephone call from a pay phone in Fosterville, Boone County, at 6:11 pm, more than a half-hour drive from the victims' home. Trial Tr. 1962; Kanawha County Sheriff Department Report of Investigation, p. 33.

The confession of Tommy Lynn Sells is further supported by the testimony of Dr. Daniel Spitz, who testified that the condition of the victims' bodies, at autopsy, indicates a time of death substantially later than the time that the Appellant was in the vicinity of the victims' home. Habeas Tr. 119. Dr. Spitz concurs with Dr. Sopher's original assessment of the time of death, "late Sunday night (September 8, 1991) or early Monday morning (September 9, 1991)." (As explained above in the Statement of Facts, Dr. Sopher appears to have changed his estimate of the time of death, not based on any medical evidence, but in order to conform to the belief of the police that the Appellant committed the crime at about 5:00 pm on Saturday, September 7, and based on the erroneous belief that the victims weren't observed alive after that time. Trial Tr. 2565-66. Had Dr. Sopher been aware of the newly-discovered evidence in this case, it is unlikely that he would have changed his original medical-based estimate of the time of death.)

(b) Implausibility of fabrication.

In the habeas proceeding, the prosecuting attorney offered alternative explanations of how Sells may have acquired the detailed information of the Cabin Creek murders, other than by

having committed the murders himself. The alternative explanations involve the speculation that Sells, on death row with nothing to lose, decided to falsely confess to the Cabin Creek murders.

The alternative explanations about how Sells may have learned the details of the Cabin Creek murders include (i) that Sells may have learned the details from the Appellant during incarceration in the Kanawha County Jail or in other penal institutions before Sells' release from prison in 1997 (Habeas Tr. 131-31); (ii) that Sells may have learned the details from the Appellant or his intermediaries during his incarceration in the Val Verde County Jail (February 7, 2006, statement); and (iii) that Sells may have learned the details from a September 3, 1993, article in Master Detective magazine, "West Virginia Shocker: Mom and Daughter Left Nude, Spread-Eagled, Raped and Knifed!" (Habeas Tr. 222; Appellant's Habeas Exhibit No. 9). For the following reasons, none of these alternative explanations are plausible.

During the time that the Appellant and Sells were in custody in West Virginia, Sells was not on death row. Instead, he was anticipating his release, and was in fact released in 1997. Habeas Tr. 17. By contrast, the Appellant was serving life without parole. It seems implausible that the Appellant and Sells would conspire for Sells to memorize the details of the Appellant's crime in order to falsely confess years later, because at the time that the Appellant and Sells were incarcerated in the same facilities, they would have no means of knowing that Sells would someday be re-arrested and placed on death row with nothing to lose, and thereby be willing to falsely confess to the Appellant's crimes. In fact, when Sells confessed to the Cabin Creek murders on April 12, 2000, he was not even on death row, but was in pretrial custody, not yet having been convicted and sentenced. Dep. Sgt. Allen, p. 15.

It is similarly implausible that Sells would be able to remember extensive details of crimes that someone else committed, when in light of his drug abuse and limited intellect, he

often had substantial difficulties remembering the details of his own crimes. Deposition, Sgt. Allen, p. 10, 20-21.

As set forth below, it is also implausible that Sells learned the details from the Appellant or his intermediaries during his incarceration in the Val Verde County Jail. Sells had been drifting across the country during the three years from his release in West Virginia in 1997 and his arrest in Texas on January 2, 2000. Respondent's Habeas Exhibit No. 3 (biography of Tommy Lynn Sells). It is implausible that the Appellant, in maximum security in West Virginia and with all of his communications being monitored, would be able to track Sells' movements or communicate with Sells as he drifted from state to state.

It is similarly implausible that the Appellant, in maximum security in West Virginia, could have learned about Sells' arrest in Del Rio, Texas, between the date of his January 2, 2000, arrest and his April 12, 2000, confession.

It is further implausible that the Appellant could have surreptitiously communicated with Sells, either directly or through intermediaries, when all of Sells' incoming and outgoing correspondence was monitored and the addresses on the envelopes were photocopied and preserved by jail authorities. (Envelopes of Sells' correspondence, submitted to the Circuit Court on February 16, 2006; and March 14, 2006, letter from the Sheriff of Val Verde County, submitted to the Circuit Court on March 15, 2006, all showing no correspondence between Sells and anyone in West Virginia.)

It is also implausible that Sells learned any details of the Cabin Creek murders from the September 3, 1993, article in Master Detective magazine. Appellant's Habeas Exhibit No. 9. This article was published almost seven years before Sells' April 12, 2000, confession. It is unlikely that Sells' would have carried this article with him during his years as a drifter. There is

no evidence that Sells had the article in his possession when he was arrested on January 2, 2000, or had it in his possession during his incarceration at the Val Verde County Jail prior to his confession on April 12, 2000.

Furthermore, there are details that Sells provided in his April 12, 2000, confession, that are not contained in the Master Detective article. Such details include the name of the bar in St. Albans, the Route 60 Lounge, where one of the victim's occasionally socialized. It is difficult to hypothesize how Sells could learn a detail as obscure as the name of a bar where one of the victims socialized, unless Sells actually met the victim at the bar, as he stated in his April 12, 2000, confession.

Similarly, in Sells' April 12, 2000, confession, he accurately stated that a television set was missing from the victims' house, and explained its disappearance. The Master Detective article referred only to the victims' VCR, without mentioning the television. The television set was not recovered by the police, and was rarely mentioned during the Appellant's trial. Trial Tr. 1923. It is difficult to conceive of how Sells could have learned of the disappearance of the television set, unless he was actually present and committed the crime, as he confessed.

By contrast, the few apparent inaccuracies in Sells confession, such as the floor where the victims' bathroom was located, are understandable in light of the passage of time and the blurring in Sells' memory of the numerous murders that he committed during his long history of serial killings. Deposition, Sgt. Allen, p. 10, 20-21.

Despite all of the reasons in support of the implausibility of fabrication, as set forth above, the Circuit Court in its final Order of September 17, 2007, held just the opposite, and ruled that the confession was, in fact, a fabrication. In so ruling, the Circuit Court emphasized

the few details in Sells' memory that appear to be erroneous, while ignoring the numerous details, set forth above, that were in fact accurate.

In *State v. Talbot*, 408 So.2d 861, (1981), the Supreme Court of Louisiana considered a similar case where the trial court denied a new trial, despite the confession, later recanted, of another person. As in the Appellant's case, the confession was set forth with "uncanny" detail, by a person with a history of committing similar crimes with the same *modus operandi*, and by a person who was known to be in the area at about the same time of the crimes. The Supreme Court of Louisiana reversed the trial court for abuse of discretion, explaining that a trial court "has no discretion or choice to ignore . . . pertinent new and material evidence in deciding a new trial motion," and that, based on the detailed confession, a proper exercise of discretion, under these circumstances, would have required the court to grant a new trial. 408 So.2d 884-87.

Similarly, in the recent case of *People v. Tankleff*, 49 A.D.3d 160, 848 N.Y.S.2d 286 (N.Y.App.Div. 2007), the Appellate Division of the Supreme Court of New York considered a case involving the trial court's refusal to grant a new trial after hearing extensive evidence of the confession of another person. The Appellate Court criticized the trial judge's disregard of the defendant's evidence of innocence. As the Court stated in reversing the conviction and awarding a new trial, the trial court "erroneously applied both a narrow approach and methodology in evaluating the evidence. It appears that the County Court never considered that the cumulative effect of the new evidence created a probability that, had such evidence been received at the trial, the verdict would have been more favorable to the defendant." 49 A.D. at 181, 848 N.Y.S.2d at 302.

(c) DNA evidence at trial.

The DNA evidence introduced at the Appellant's trial does not contradict or refute the confession of Sells. There was no DNA evidence at trial that was collected at the home of the victims. (The only DNA evidence from the home, blood on a gauze pad, was suppressed in pretrial proceedings because the random match probability -- one in seven -- was too low to be probative. Trial Tr. 547-48, 1375.) Consequently, at trial there was no DNA evidence collected at the crime scene that linked the Appellant to the crime.

The only DNA results introduced at trial were the tests of blood on the teddy bear T-shirt that the Appellant removed from the victim's automobile. According to the testimony at trial, the Appellant brought this T-shirt with him when he arrived at the home of Jeanette Laws, driving the victims' car. Trial Tr. 2182, 2333-34.

As set forth in the Statement of Facts, above, FBI DNA analyst Linda Harrison testified to finding the DNA profile of both the victim, Pamela Casteneda, and the DNA profile of the Appellant, on this T-shirt (although the trial judge gave a cautionary instruction to the jury because of the unusually low random match probability). Trial Tr. 2184.

The DNA testimony about the profiles of the bloodstains on the teddy-bear T-shirt is not particularly significant because it was undisputed that the Appellant drove the victims' car at a time when he was injured and bleeding from his own car wreck, Trial Tr. 2229, 2243, (thereby providing an explanation of the presence of his own blood on the T-shirt). Furthermore, the victim, Pamela Casteneda, suffered from chronic colon disease, had a colonoscopy, and experienced continual bleeding (thereby explaining the presence of a small spot of her own blood on the T-shirt that was in her car.) Trial Tr. 1709-10.

Additionally, as Dr. Whitehurst testified at the habeas proceeding, there was not sufficient quality assurance at the FBI crime lab at the time of the DNA testing of the evidence in the Appellant's case to assure the reliability of the results. Such lack of reliability includes a "very strong possibility of cross-contamination" of evidence. Habeas Tr. 84-86. Because the amount of the victim's blood on the T-shirt was so minimal as to be entirely consumed by DNA testing, the possibility of cross-contamination (by contact or transfer from the victim's bloody crime scene clothing or known blood sample) is greater than usual.

The United States Supreme Court recently discussed, in detail, the problems of cross-contamination involving small DNA samples during the early years of DNA testing in the FBI crime lab. *House v. Bell*, 126 S.Ct. 2064, 2078-83 (2006). As the Court stated, after reviewing testimony about possible cross-contamination, "whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin." 126 S.Ct. at 2083.

(d) The likelihood that the newly-discovered evidence will produce an opposite result in a new trial on the merits.

In addition to the substantial corroboration of the confession of Tommy Lynn Sells and the implausibility of its fabrication (as discussed above), there are additional reasons to believe the newly-discovered evidence will produce an opposite result in a new trial.

First, the credibility of a confession from Tommy Lynn Sells, and its effect on a jury, has already been tested in the Illinois case of *People v. Julie Rae Harper*, No. 04-CF-104 (2d Judicial Cir., Ill.). Julie Rae Harper was convicted of the 1997 murder of her 10-year-old son. She had always maintained her innocence, explaining that an unknown intruder broke into her

home and committed the murder. Her claim was ignored until the startling confessions of Tommy Lynn Sells to his long string of murders, including the murder of her son.

Julie Rae Harper's conviction was reversed on other grounds. In her second trial, in July 2006, unlike in her first trial, the detailed confession of Tommy Lynn Sells was introduced into evidence. The Harper case is particularly significant because, after providing his detailed confession in the Harper case, Sells also recanted -- and recanted at the same time he purportedly recanted in the Appellant's case. (Tr. February 17, 2006, habeas hearing, p. 8; "Killer Conversation," *Del Rio News Herald*, February 9, 2006.) In a new trial where the jury heard both the confession of Tommy Lynn Sells and the purported recantation, Harper was acquitted, despite the recantation. *People v. Julie Rae Harper*, No. 04-CF-104 (2d Judicial Cir., Ill., July 26, 2006).

The acquittal of Julie Rae Harper, in a second trial where the confession of Tommy Lynn Sells was admitted, is persuasive evidence that the confessions of Tommy Lynn Sells are compelling, and that the Appellant would also receive a different verdict, if the detailed confession of Tommy Lynn Sells was introduced in a new trial of the Appellant.

Additionally, the West Virginia case of *State v. Beard* bears striking similarities to the Appellant's case. (*State v. Jacob Beard*, Nos. 93 F-1 and 93-F-6, Circuit Court of Pocahontas County, subsequently transferred to Greenbrier County, Nos. 93 F- 43, 44, and then Braxton County, on changes of venue.) Much like in the *Harper* case, in the second *Beard* trial, with the new evidence of a confession by a serial killer, the defendant was also acquitted. The *Beard* case is similar to the Appellant's case in five key respects.

First, as in the Appellant's case, Beard was indicted for the brutally senseless murder of two women. Indictment Nos. 93-F-1 and 6, Circuit Court of Pocahontas County. Second, as in

the Appellant's case, Dr. Sopher initially provided a time of death -- based on the medical evidence of the stage of rigor mortis in the two bodies -- that would have exonerated the Defendant. Post-mortem Examination Findings, No. WV-80-442, 443, June 26, 1980. Third, as in the Appellant's case, Dr. Sopher subsequently changed the time of death, based on the non-medical realization that the defendant was not present at the time of death. *State v. Beard*, No. 93-F-43, 44, Circuit Court of Greenbrier County, Trial Transcript, June 1993, at 393. Fourth, as in the Appellant's case, in the absence of a trustworthy confession by someone else, the defendant was convicted and sentenced to life without parole. The conviction was affirmed on appeal. *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995). Fifth, as in the Appellant's case, after the trial, the defendant obtained a sworn statement of a serial killer (in this instance Joseph Paul Franklin) on death row in Missouri. The sworn confession was subject to cross-examination. (An earlier, pretrial confession by the serial killer was not by sworn deposition, subject to cross-examination, and was not considered to be reliable enough to be admissible at the first trial.)

The second trial of Jacob Beard was held in May 2000, in Braxton County (on another change of venue). At the second trial, the videotaped deposition of serial killer Joseph Paul Franklin was played for the jury and admitted into evidence. Upon the conclusion of the trial, Jacob Beard was acquitted. *State v. Jacob Beard*, Nos. 93 F-1 and 93-F-6, Circuit Court of Pocahontas County; and Nos. 93 F- 43, 44 (Circuit Court of Greenbrier County, May 31, 2000).

Much like the case of Julie Rae Harper, the acquittal of Jacob Beard, in a case with so many key similarities to the Petitioner's case (double homicide; altered time of death by Dr. Sopher; confession by serial killer not admitted in first trial but admitted in second) provides

persuasive evidence that a second trial of the Appellant, where the jury would hear the detailed confession of someone else, will produce a different result.

5. Fifth requirement for granting a new trial (non-impeachment evidence).

The fifth and final requirement for granting a new trial based on newly-discovered evidence is that a new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. The confession of Tommy Lynn Sells is not offered by the Appellant solely to discredit or impeach a witness for the State. It is substantive evidence that a person other than the Appellant committed the crimes for which the Appellant was convicted.

C. Abuse of discretion for failure to grant a new trial based on newly-discovered evidence of confession by Tommy Lynn Sells.

In *House v. Bell*, 126 S.Ct. 2064 (2006), the United States Supreme Court recognized the significance of the newly-discovered evidence that someone else confessed to a crime. The Court began its analysis by acknowledging its general rule that claims that are procedurally barred could not ordinarily be revived in post-conviction habeas corpus proceedings. In considering the newly-discovered confession of someone else, however, the Court recognized the importance of eliminating procedural bars to relief. As the Court stated, "In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default is not a bar to a federal habeas corpus petition." 126 S.Ct. at 2068. The Court further stated:

> In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case, " *Schlup v. Delo*, 513 U.S. 298, 324 (1995), the Court has recognized a miscarriage-of-justice exception. "[I]n appropriate cases,'" the Court has said, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'"

House v. Bell, 126 S.Ct. at 2076.

See also, T. Malia, *Coram Nobis on Grounds of Other's Confession to Crime*, 46 ALR 4th, 468 (1986); E. Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. Central L.J. 197 (2002); D. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly-Discovered Non-DNA Evidence in State Courts,* 47 Ariz.L.Rev. 655 (2005).

Several cases decided by this Court are instructive on the issue of whether a particular claim of a newly-discovered confession should result in a new trial: *State v. Sparks*, 171 W.Va. 320, 298 S.E.2d 857 (1982); *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984); and *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995).

In *State v. Sparks*, the defendant was convicted of arson, based in large part on the defendant's own confession to the crime. After the conviction, a close friend of the defendant then confessed that he -- instead of the defendant -- committed the arson. The close friend was functionally retarded and easily impressionable, and was uncertain about the details of the crime. 171 W.Va. at 323-25, 298 S.E.2d at 860-62. The circuit court denied habeas relief, based on the close friendship between the defendant and the person providing the new confession, the indefiniteness of the new confession, and the inconsistencies in the statement. The circuit court also found that the new evidence could have been discovered, with the exercise of due diligence, before the first trial. On appeal, this Court found that the circuit court did not abuse its discretion

in denying a new trial, and affirmed the circuit court's ruling. 171 W.Va. at 324-35, 298 S.E.2d at 861-62.

None of the circumstances that formed the basis for denying a new trial in the *Sparks* case apply to the present case. In contrast to the *Sparks* case, there is no evidence that the Appellant and Tommy Lynn Sells were friends. The confession of Tommy Lynn Sells is detailed and contains no internal contradictions. Finally, because there is no indication that Tommy Lynn Sells confessed to anyone until more than seven years after the date of the Appellant's trial, the existence of the newly-discovered evidence could not have been obtained prior to trial with the exercise of due diligence.

In the case of *State v. King*, the defendant was convicted of uttering a forged instrument. After his trial, he produced a notarized statement from another person, purporting to confess to the crime. At his hearing on a motion for a new trial, however, the defendant acknowledged that he knew of the purported confession before trial, but didn't try to introduce it into evidence until after trial. 173 W.Va. at 165, 313 S.E.2d at 442.

On appeal, this Court stated that "No one would doubt that a confession by another person to the crime, if discovered after trial, could be a ground for a new trial on the basis of newly-discovered evidence." 173 W.Va. at 165, 313 S.E.2d at 442. Because the confession of another was known before the trial, however, the confession didn't meet the requirement that it be newly-discovered, and the Court affirmed the circuit court's denial of a new trial. 173 W.Va. at 166, 313 S.E.2d at 443.

By contrast, in the present case, as set forth above in the Statement of Facts, the confession of Tommy Lynn Sells occurred over seven years after the Appellant's trial.

Consequently, in contrast to the confession of another person in *State v. King*, the confession of Tommy Lynn Sells in the present case meets the requirement of newly-discovered evidence.

In *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995), a case in many respects similar to the present case (as discussed above), the defendant was convicted of the murders of two women and sentenced to life without parole. Unlike in the Appellant's case, the confession of a serial killer was known before the first trial. The confession was disallowed at the first trial because the confession was not by sworn deposition and was not subject to cross-examination. Consequently, the confession was treated as a hearsay statement that was not considered to be reliable enough, under Rule 804(b) of the Rules of Evidence, to be admissible at the first trial. 194 W.Va. at 748, 461 S.E.2d at 494. Subsequent to the first trial and appeal, however, the defendant was able to obtain a sworn statement from the serial killer, a statement that was then subject to cross-examination. As set forth above, the defendant subsequently received a new trial and was acquitted.

The *Beard* case is instructive for three of its rulings: (1) the trial court's original ruling denying the admissibility of the confession; (2) the Supreme Court of Appeals' decision affirming the trial court; and then (3) the trial court's subsequent ruling granting a new trial and admitting the confession of the serial killer. The trial court in its original ruling, and the Supreme Court of Appeals in its ruling on appeal, held that the purported confession should be excluded because it was not taken under oath and was not subject to cross-examination. By contrast, in the present case the confession by the serial killer is set forth in a sworn deposition where the State of West Virginia participated and cross-examined the witness -- precisely the form that the circuit court in the *Beard* case admitted into evidence in the second trial, resulting in an acquittal.

Additionally, a number of other jurisdictions have considered the newly-discovered evidence of the confession of another person, under circumstances similar to the Appellant's case, and subsequently reversed the convictions for abuse of discretion and awarded new trials. In *State v. Talbot*, 408 So.2d 861 (La. 1980) (also discussed in Part I.B.4.(d) of the Discussion of Law, above) the defendant was convicted of charges of armed robbery and sexual assault. After the conviction, another person confessed to being the perpetrator of the crimes, though later recanting the confession. 408 So.2d at 879. The trial judge denied the defendant's motion for a new trial. The Supreme Court of Louisiana reversed, finding that the trial judge abused his discretion in failing to award a new trial.

In reversing the conviction and awarding a new trial, the Court stated, "it was not for [the trial judge] to weigh the new evidence as though he were a jury, determining what is true and what is false. The judge's duty was the very narrow one of ascertaining whether there was new material fit for a new jury's judgment. If so, will honest minds, capable of dealing with evidence, probably reach a different conclusion, because of the new evidence, from that of the first jury." 408 So. 2d, at 887.

The *Talbot* case is significant because of its numerous similarities to the Appellant's case. As in the present case, the State in *Talbot* opposed a new trial on the grounds that the defendant and the person who provided the newly-discovered confession were cellmates and could have fabricated the new confession, and that the person confessing later retracted the confession. The Louisiana court rejected these arguments, noting the person's "uncanny display of knowledge concerning the details of the crime," and finding it "difficult to believe," and "incredible" that the detailed confession could have been fabricated. 408 So.2d, at 886-87. The court also noted the

same *modus operandi* in similar crimes known to have been committed by the person providing the newly-discovered confession. 408 So.2d at 887.

All of the these factors leading to the reversal of the conviction in *Talbot* also apply in the Appellant's case. As set forth above, the confession of Tommy Lynn Sells contains an uncanny display of knowledge concerning the details of the crime, rendering it difficult to believe that the confession was fabricated. Additionally, Tommy Lynn Sells was known to be in Kanawha County at about the time of the murders, and the murders are consistent with Sells' known *modus operandi* because Sells committed a long string of similar offenses across the country. Habeas Tr. 151-54; Respondent's Habeas Exhibit No. 3. For the same reasons that Talbot received a new trial, the Appellant should receive a new trial.

As set forth in greater detail in Part I.B.4(b) above, despite all of the reasons in support of the implausibility of fabrication, the Circuit Court in its final Order of September 17, 2007, held just the opposite, and ruled that the confession was, in fact, a fabrication. Much as the Louisiana Supreme Court held in the *Talbot* case, 408 So.2d 884-87, in emphasizing the few details in Sells' memory that appear to be erroneous, while ignoring the numerous details that were in fact accurate, the Circuit Court's findings of fact in the Appellant's case are erroneous and its final Order denying relief an abuse of discretion.

Similarly, in the Arkansas case of *State v. Scott*, 289 Ark. 234, 710 S.W.2d 212 (1986), after the defendant was convicted of murder and aggravated robbery, the defendant filed a petition for a writ of coram nobis, based on the newly-discovered confession of serial killer Henry Lee Lucas. The trial judge noted internal conflicts in the newly-discovered confession, as well as inconsistencies between the serial killer's testimony before the court and his statements to

the police. 289 Ark. at 236, 710 S.W.2d at 213-14. Despite the inconsistencies, the trial court granted a new trial, and the Supreme Court of Arkansas affirmed.

Additionally, in *Baker v. State*, 336 So.2d 363 (Fla. 1976), the trial judge reversed a robbery conviction based on the newly-discovered evidence of the confession of someone else. The intermediate District Court of Appeal reversed the trial court. On appeal to the Supreme Court of Florida, the Court reversed the intermediate court of appeals and reinstated the trial judge's ruling awarding a new trial. As the Court stated, "Law courts depend for such effectiveness as they have on the cooperation of the wider community, and trial must be conducted in a way that will earn the cooperation and support of people of good will in every walk of life. Excluding from one man's trial another man's confession to the offense charged is no means to that end." 336 So.2d at 369.

For all these reasons, the trial court abused its discretion in the Appellant's case by denying a new trial for the Appellant.

D. Violations of Eighth and Fourteenth Amendments of the United States Constitution, and Article III, Sections 5 and 10 of the West Virginia Constitution, based on denial of new trial despite showing of actual innocence.

In *Kuhlman v. Wilson*, 477 U.S. 436, 452 (1986), the United States Supreme Court acknowledged that "a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he is in custody." Similarly, in *Sawyer v. Whitley*, 505 U.S. 333, 340-41 (1992), the Supreme Court acknowledged the significance of a newly-discovered confession of someone else, stating "in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mistake."

In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court considered the issue of whether actual innocence, established after trial, would render the imposition of the death penalty to be a violation of the Eight and Fourteenth Amendments of the U.S. Constitution, even absent a showing of a constitutional violation at trial. The Court did not resolve the issue, finding that the petitioner in that case failed to meet the extraordinarily high showing of actual innocence. *See also*, *Schlup v. Delo*, 513 U.S. 298 (1995) (discussing the standard for "gateway," rather than "freestanding" claims of innocence), and *House v. Bell*, 126 S.Ct. 2064 (2006) (finding the newly-discovered confession of someone else in a case involving a "gateway" claim of actual innocence.)

By contrast to the failure of the petitioner in *Herrera v. Collins* to meet the extraordinarily high showing of actual innocence, in the detailed confession of Tommy Lynn Sells, and the implausibility of its fabrication, the Appellant in the present case has met the extraordinarily high showing. Although the Appellant's case does not involve the death penalty, it does involve imprisonment for the rest of his life, without possibility of parole. Consequently, the denial of a new trial, despite the Appellant's showing of actual innocence, constitutes a violation of the Appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution, and Article III, Sections 5 and 10 of the West Virginia Constitution (cruel and unusual punishment and due process).

II. The Circuit Court Erroneously Considered a Purported Recantation by Tommy Lynn Sells, Despite the Recantation Being Unauthenticated, Unsworn, and Not Subject to Cross-Examination, in Violation of the Rules of Evidence and This Courts' Precedents Regarding Recantations.

In denying a new trial based on the confession of Tommy Lynn Sells, the Circuit Court based its ruling, in part, on Sells' purported recantation of the confession. As the Court stated in its Order denying relief, "Tommy Lynn Sells has recanted his 'confession' on more than one occasion." Order, September 17, 2007, para. 75.

In considering the purported recantation by Tommy Lynn Sells as a basis for its ruling, the Circuit Court violated this Court's precedents involving recantations and the rules of evidence applicable to unauthenticated evidence. *See,* Rule 901(a), West Virginia Rules of Evidence.

A. The admissibility of Sells' confession.

The initial, April 12, 2000, confession of Tommy Lynn Sells to the Texas Rangers was repeated, by videotaped deposition, on September 29, 2004. The State of West Virginia participated in this deposition and subjected Sells to vigorous cross-examination.

The confession of Sells, by deposition, meets the admissibility requirements of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, specifically Rule 7 (discovery), Rule 8 (expansion of record), and Rule 9 (evidentiary hearing).

B. Inadmissibility of Sells' recantation.

By contrast to Sells' confession, his purported recantation, taken by the Val Verde County Sheriff's department at the Val Verde Jail on February 7, 2006, was not taken with notice

to the Appellant or with an opportunity to cross-examine Sells.

Subsequent to this purported recantation, the State moved to re-open Sells' September 29, 2004, deposition, or in the event that Sells declined to be re-deposed, then to take the deposition of the officer who obtained the purported recantation, at which time the purported recantation could be explored by counsel and subject to cross-examination. Tr. February 17, 2006, hearing, at 5, 9, 14-15. By Order of April 10, 2006, the Court granted the State's motion to further depose Sells.

The State did not complete the arrangements for either the deposition of Sells or of the deputy who obtained the purported recantation, and the deposition did not occur.

Consequently, the circuit court's consideration of Sell's purported recantation violated Rule 901(a) of the West Virginia Rules of Evidence, which provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rather than present Sells or the police witness who allegedly took the statement and could supposedly identify and authenticate it as Sells' statement, the State merely gave the statement to the circuit court, over the vigorous objection of the Appellant. Tr. Feb. 17, 2006, habeas hearing, at 8-14, 30. The State failed to establish by a witness with knowledge of the statement that it is what the State claimed it to be -- a recantation by Sells. *See* Rule 901(b)(1) of the West Virginia Rules of Evidence.

In *State v. Jenkins*, 195 W.Va. 620, 624, 466 S.E.2d 471, 475 (1995), this Court stated that "the authentication requirement . . . stems from a healthy common law skepticism that courts should not blindly assume that an offered piece of evidence is what it appears to be or what the proponent claims it is. Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*

§ 9-1(A) at 300 (3d ed. 1994)." *See also, State v. Harris*, 169 W.Va. 150, 153-54, 286 S.E.2d 251, 254-55 (1982) (requirements for admissibility of defendant's tape recorded inculpatory statements which include "an establishment of the authenticity and correctness of the recording[.]"; *State ex rel. Corbin v. Haines*, 218 W.Va. 315, 323, 624 S.E.2d 752, 760 (2005) (trial and habeas courts properly found inadmissible a letter purportedly written by a co-defendant implicating another person as the shooter in a homicide case, stating, "there was no attempt at any level to authenticate the letter as required by Rule 901 of the *West Virginia Rules of Evidence*.").

In the present case, the Circuit Court treated Sells' purported statement as an authentic recantation, without requiring the State to comply with Rule 901(a) of the Rules of Evidence. In doing so, the Circuit Court's violation of this rule and improper consideration of Sells' purported recantation was prejudicial error, because the Circuit Court cited the recantation as one of the reasons for denying a new trial.

Moreover, "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross- examine." *Crawford v. Washington*, 541 U.S. 36, 49 (2004). In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Supreme Court considered a related circumstance where a recantation was admitted into evidence without cross-examination. As the Court stated,

> Chambers was denied an opportunity to subject [the] damning repudiation and alibi to cross-examination. He was not allowed to test the witness' recollection, to probe into the details of his alibi, or to 'sift' his conscience so that the jury might judge for itself whether [the] testimony was worthy of belief. . . . The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process.

410 U.S. at 1045-46.

While the Appellant's constitutional rights to confrontation may not be at issue in this case, cross-examination of Sells' purported recantation would have been particularly significant because it would have provided counsel the opportunity to explore the inherent contradictions in the recantation. In the purported recantation, for example, Sells claims that he fabricated his confession based on information that he received in two letters: a letter that he had received in the Val Verde jail from someone in Indiana, and a letter that he had received that was written to his Texas lawyer by the Appellant's former West Virginia habeas lawyer, Wendy Campbell. As set forth below, both of these assertions are inherently suspect and ripe for cross-examination.

With regard to the letter from Indiana, the Val Verde Jail has maintained photocopies of all envelopes received by Sells. No such letter from anyone in Indiana was ever received. State's Supplemental Discovery, February 16, 2006.

With regard to the letter from Ms. Campbell, Sells initial confession, with full details, was provided on April 12, 2000. Ms. Campbell could not have influenced this confession because she had no involvement in this case until nearly four years later, on January 20, 2004, when this Court first appointed the Kanawha County Public Defender Office to represent the Appellant. Order, January 20, 2004.

The West Virginia Supreme Court of Appeals has recognized that most courts hold that a recantation is "exceedingly unreliable and untrustworthy, especially when it involves an admission of perjury." *State v. Dudley*, 178 W.Va. 122, 125, 358 S.E.2d 206, 209 (1987); *State v. Nicholson*, 170 W.Va. 701, 703, 296 S.E.2d 342, 344 (1982); *State v. Hamric*, Syl. Pt. 9, 151 W.Va. 1, 151 S.E.2d 252 (1966).

In both *Dudley* and *Nicholson*, the Court also stated that a recantation is sufficient as newly discovered evidence "[o]nly under circumstances where there are credible corroborating circumstances that would lead the trial court to conclude that the witness did, indeed, lie at the first trial . . . " *State v. Dudley*, 178 W.Va. at 126, 358 S.E.2d at 210; *State v. Nicholson*, 170 W.Va. at 704, 296 S.E.2d at 345. The Circuit Court found no credible corroborating circumstances to support the purported recantation.

Consequently, for all of the above reasons, the Circuit Court erroneously considered the purported recantation of Sells in denying the Appellant habeas corpus relief.

RELIEF REQUESTED

For the reasons set forth above, the Appellant respectfully requests that his convictions be set aside and a new trial awarded.

Respectfully submitted,

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Certificate of Service

I, George Castelle, do hereby certify that on the 2nd day of September, 2008, I delivered a copy of the foregoing Brief of Appellant, by U.S. mail, upon:

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